IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

PAMELA LARRY, Appellant, v. HARTFORD FIRE INSURANCE COMPANY, Respondent.	)	No. 62444-0-I UNPUBLISHED OPINION FILED: June 1, 2009

Ellington, J. — The trial court properly dismissed Pamela Larry's lawsuit against Hartford Fire Insurance Company (Hartford) because she failed to file suit within the one year limitation period provided by the governing statute. We affirm.

BACKGROUND

This is the sorry tale of a foreclosure rescue scam.[1] Pamela Larry purchased her home in February 2005. Shortly thereafter, she lost her job. The condominium was scheduled for foreclosure.

In February 2006, Larry was contacted by Washington Loan Network (WLN), a licensed mortgage broker. WLN represented to Larry that it could help her stay in her home through a sale-leaseback deal wherein Larry would sell her home to a buyer,

[1] These facts are taken from Larry's complaint.

who would then lease it to her until she could obtain favorable financing to buy it back again. Larry met with WLN representatives. By the end of the meeting, she had signed a number of documents, including a real estate purchase and sale agreement that did not identify the buyer and did not indicate the purchase price. The WLN representative did not explain the documents to Larry and did not give her a complete copy. He told Larry he would try to get her $9,000 out of the transaction.

In April 2006, Larry's home was sold for $215,000 to an agent or employee of WLN. The purchase price was $74,000 more than Larry paid one year before and $84,000 above the 2006 King County assessment. In April 2006, Larry signed closing documents at a title company and received a check for $7,000. She did not receive a HUD statement and only later learned that a company closely related to WLN, R & R Development, received more than $33,000 out of the transaction. Larry also did not realize she had paid the buyer's $12,000 closing costs. WLN received almost $6,000 in various fees.

The rental agreement presented to Larry required rent of $1,700 a month, $500 more per month than her mortgage payment had been. Predictably, Larry was unable to stay current and was soon evicted, in June or July 2006. The new owner subsequently defaulted on the mortgage.

Larry had "a sense that evicting me from my home in July 2006 was illegal" and that charging rent above her unaffordable mortgage payments "was wrong," and in August, she sought legal services.[2] She first met with attorneys in October 2006.

[2] Clerk's Papers at 165.

At some point, the Department of Financial Institutions (DFI) apparently initiated an investigation against both WLN and the title company used in this transaction, and DFI seized the title company's documents concerning WLN's transactions.

In March 2008, Larry filed suit against WLN and other defendants. These included Hartford, which had issued a surety bond to WLN.[3] Larry alleged 15 causes of action, including claims against the bond for WLN's violations of Washington's Mortgage Brokers Practices Act (MBPA), chapter 19.146 RCW. Larry alleged WLN and others "employed a scheme, device, or artifice to defraud or mislead [her]," and "engaged in unfair and deceptive practices."[4] Larry also included a claim under the federal Real Estate Settlement Practices Act (RESPA), 12 U.S.C. § 2601, for failure to make certain disclosures and for taking kickbacks.[5]

Hartford was the only defendant to file an answer. Larry obtained an order of default against all others.

Hartford moved for summary judgment, arguing Larry's claims against it are time-barred under the MBPA, which has a one year limitation period. The trial court agreed and dismissed Larry's case against Hartford. This is the only action at issue

[3] The surety bond is not in the record.

[4] Clerk's Papers at 17.

[5] Larry's remaining causes of action included breach of contract, violation of the Consumer Protection Act, chapter 19.86 RCW, violation of the Real Estate Brokers Act, chapter 18.85 RCW, fraud, breach of fiduciary duty, breach of the implied duty of good faith and fair dealing, negligent misrepresentation, conversion, unjust enrichment, unconscionability, and infliction of emotional distress.

here.

DISCUSSION

Larry challenges the dismissal on numerous grounds. She contends the court should have applied the discovery rule to conclude that her cause of action did not accrue until sometime after spring of 2007, when she obtained certain documents related to the sale of her home. She also argues the MBPA's limitation period is preempted by federal law, and/or that the court should have applied the six year contract statute of limitations instead of the one year limitations period under the MBPA.

Unfortunately, Larry neglected to make any of these arguments to the trial court, leaving us with no record for review. Accordingly, we decline to consider them on appeal.[6] To her remaining arguments, we apply the usual standard of review for summary judgment.[7] She contends the court should have applied equitable tolling, and that the statute of limitations in the MBPA violates public policy.

Mortgage brokers must file a surety bond as a licensing requirement under the MBPA.[8] The bond runs to the state as obligee, "first to the benefit of the borrower and

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[6] RAP 2.5(a).

[7] This court reviews summary judgment de novo. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Summary judgment is affirmed when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Id.; CR 56(c). All facts and reasonable inferences are considered in the light most favorable to the nonmoving party, and summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion. Id.

[8] RCW 19.146.205(4)(a).

then to the benefit of the state and any person or persons who suffer loss by reason of the applicant's . . . violation of any provision of this chapter."[9] A person injured by a violation of the MBPA may bring an action against the surety bond. But "[a]ny such action must be brought no later than one year after the alleged violation."[10]

Equitable tolling is a doctrine under which a trial court may allow an action to proceed when justice requires it, even though the limitations period has expired.[11] The remedy may be appropriate to effectuate the policies underlying the authorizing statute and the purposes underlying the limitations statute.[12] But equitable tolling is typically applied "only sparingly, and should not extend to 'a garden variety claim of excusable neglect.'"[13] Predicates for equitable tolling are bad faith preventing timely assertion of a claim and due diligence by the claimant: "bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff."[14] The party asserting equitable tolling bears the burden of proof.[15]

Hartford had nothing to do with the transaction involving WLN, and Larry concedes that Hartford did not engage in bad faith. She asks us to extend equitable tolling to situations where the bad faith of a third party prevents a plaintiff from

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[9] Id.

[10] RCW 19.146.240(2)(a).

[11] Millay v. Cam, 135 Wn.2d 193, 206, 955 P.2d 791 (1998).

[12] Benyaminov v. City of Bellevue, 144 Wn. App. 755, 767, 183 P.3d 1127 (2008), review denied, 165 Wn.2d 1020, 203 P.3d 378 (2009).

[13] State v. Duvall, 86 Wn. App. 871, 875, 940 P.2d 671 (1997) (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96, 11 S. Ct. 453, 112 L. Ed. 2d 435 (1990)).

[14] Millay, 135 Wn.2d at 206.

[15] Benyaminov, 144 Wn. App. at 767.

learning the existence of a potential claim. For the proposition that equitable tolling can be triggered by the conduct of a third party, Larry cites our conclusion in Benyaminov v. Bellevue[16] that the doctrine did not apply because the plaintiff failed to show bad faith on the part of the defendant "or anyone else."[17] Similarly, in Douchette v. Bethel School District No. 403,[18] our Supreme Court indicated in dicta that one factor to be considered in determining whether equitable tolling should apply to plaintiff's age discrimination claim was whether the plaintiff relied "on authoritative statements made by the administrative agency that misled claimant about the nature of her rights."[19]

Assuming, arguendo, that equitable tolling may apply in the absence of the defendant's bad faith, it does not apply here because Larry fails to establish the factual predicates for the doctrine. She has shown no bad faith on the part of any party that prevented her from timely filing suit. She alleges egregious bad faith leading up to her eviction, but that forms the basis for her claim; it did not prevent her from filing her claim. Indeed, other than WLN's conduct before her eviction, she describes no bad faith at all. Nor has she shown that she acted with due diligence. Larry admits she thought her eviction in July 2006 was illegal, and she sought legal advice in August 2006. She first met with attorneys in October 2006. Though she

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[16] 144 Wn. App. 755, 763, 183 P.3d 1127 (2008).

[17] Id.

[18] 117 Wn.2d 805, 818 P.2d 1362 (1991)

[19] Id. at 811 (citing Copeland v. Desert Inn Hotel, 99 Nev. 823, 826, 673 P.2d 490 (1983) (allowing equitable tolling because claimant was misled by the Nevada Equal Rights Commission)).

alleges she had difficulty unraveling the complex business relationships among the defendants and obtaining relevant documents from DFI, she provides no evidence of the steps she

took to accomplish these tasks or the obstacles she encountered during the months remaining in the limitations period.[20] Nor does she claim any difficulty learning that Hartford was the surety. On this record, equitable tolling would not apply.

Public Policy

Larry next urges us to hold the MBPA's one year limitation period void as against public policy. She contends the limitation provision is counterintuitive, undermines the MBPA's stated policy "to promote honesty and fair dealing with citizens and to preserve public confidence in the lending and real estate community,"[21] derogates the longer limitations periods for causes of action impliedly incorporated into the MBPA, and encourages hasty litigation.[22] Even if we agreed that a longer limitations period might better serve the statutory objective, which we do not, we would reject Larry's assumption that courts are free to disregard unambiguous statutory language whenever persuaded that doing so would effect better public policy.[23]

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[20] Even if the limitations period were tolled until Larry's attorneys obtained the documents she contends were critical, it is not at all clear that the lawsuit was timely. Larry's counsel represented at oral argument that DFI provided the documents in the "spring" of 2007, but Larry did not file her complaint until March 2008. Larry does not explain what action or investigation was necessary after receiving the documents that would justify further tolling the limitations period.

[21] RCW 19.146.005.

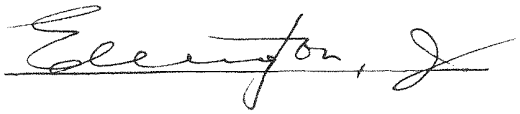
[22] Only the first of these arguments were made to the trial court. Hartford responds that the limitation period reflects a sound and deliberate policy choice to limit risk for surety companies to ensure sufficient access to the bonds.

[23] Larry relies on three cases to argue that appellate courts may "interpret[] statutes in a way that achieve[s] the stated purpose of the law, even though it require[s] a contradiction of a specific, literal term in the statute." Appellant's Br. at 24. But none of the cases support this proposition. See Amburn v. Daly, 81 Wn.2d

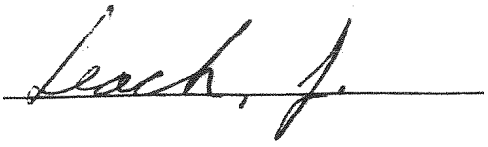
Courts "'should resist the temptation to rewrite an unambiguous statute to suit our notions of what is good public policy, recognizing the principal that the drafting of a statute is a legislative, not a judicial, function.'"[24]

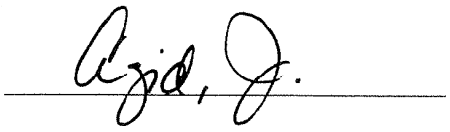
Here, the legislature unambiguously established a time certain beyond which recovery against a surety bond is unavailable. Larry failed to file suit in time. Summary judgment was appropriate.

Affirmed.



WE CONCUR:





241, 501 P.2d 178 (1978) (court refused to apply statutory amendments retroactively to extinguish outstanding unemployment claims in part because such result was inconsistent with legislative purpose); Wilson v. Lund, 74 Wn.2d 945, 447 P.2d 718 (1968) (court refused to deny right of divorced mothers to sue for wrongful death of minor child though not explicitly provided by statute because that result clearly inconsistent with statutory scheme that afforded the right to mothers in other circumstances); Nationwide Papers, Inc. v. Northwest Egg Sales, Inc., 69 Wn.2d 72, 416 P.2d 687 (1966) (court interpreted statute of frauds exception for goods "manufactured by seller especially for the buyer" to include goods manufactured by a third party at the seller's expense because statute did not foreclose such interpretation, which was clearly consistent with the purpose of the exception).

[24] Sedlacek v. Hillis, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) (internal quotation marks omitted) (quoting State v. Jackson, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999)).